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IN THE

Supreme Court of the United States

No._____

NICK SAGONIAS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To The Honorable Supreme Court of the United States:

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit entered June 2, 1955, and which judgment affirmed the conviction of this petitioner and upheld the judgment and sentence against him pronounced by the District Court of the United States in and for the Southern District of Florida. Rehearing denied June 28th, 1955. Said District Court judgment being entered July 7, 1954.

OPINIONS BELOW

The District Court rendered no opinion.

The opinion of the Circuit Court of Appeals was rendered on June 2, 1955, and has not been officially reported, and its order denying petition for rehearing was dated June 28, 1955. Copies attached as App. 1a-7a.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28 USC 1254 (1).

QUESTIONS PRESENTED

1. The court below erred in extending the terms of the statute by creating a new class of persons to be affected by the operation thereof by holding that a person who admittedly was not liable for the 10% excise tax imposed on wagers by Sec. 3285, Title 26, U. S. C. and who admittedly did not actually receive or accept any wagers on behalf of one so liable, but who was a mere employee paid a fixed regular salary of $40.00 a week as a messenger or "pick-up" man and who only transported wagers, which had been previously received and accepted by the operator's betting agents, and delivered them to the operator, was liable to register and pay the special $50.00 occupational stamp tax required by Section 3290, Title 26 U. S. C.

2. The indictment charged defendant was engaged in the occupation of accepting wagers in a lottery and wilfully failed to register and pay the required tax. The Government's testimony clearly disproved this charge and established that defendant was only a mere messenger paid a fixed weekly salary and accepted no bets or wagers from any bettors at all; therefore, the proof not only utterly failed to sustain but affirmatively disproved the charge.

3. The Act under which the indictment was brought became effective on Thursday, November 1, 1951, and the accused, a mere employee as messenger or "pick-up" man, was arrested on Saturday, November 3, 1951, and found in possession of wagers which had

been previously accepted from bettors by operator's agents, *and said wagers were on a lottery determined weekly on Saturdays*, and the record fails to disclose that any of said wagers were received or accepted from bettors after the effective date of said Act; said record, therefore, is legally insufficient to establish any offense under said Act and the Court erred in holding that it was "immaterial when the wagers he was delivering were placed or accepted," whether before or after the effective date of said Act.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Article 1, Section 1 of the United States Constitution provides as follows:

> "All legislative powers herein granted shall be vested in a Congress of the United States, which will consist of the Senate and House of Representatives."

Sub-chapter A of Chapter 27A of Title 26, Sections 3285, and 3287 insofar as material here, provide:

> "Section 3285. (a) Wagers. There shall be imposed on wagers, as defined in sub-section (b), an excise tax equal to ten per centum of the amount thereof."
>
> "(b) *DEFINITIONS.* For the purposes of this chapter—
>
> (1) The term 'wagers' means (A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers, (B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and, (C) any wager placed in a lottery conducted for profit."

"(d) Persons liable for tax. Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery."

"Section 3287. Certain provisions made applicable. All provisions of law, including penalties, applicable with respect to any tax imposed by section 2700 shall, insofar as applicable and not inconsistent with the provisions of this sub-chapter, be applicable with respect to the tax imposed by this sub-chapter. In addition to all other records required pursuant to section 2709, *each person liable for tax under this sub-chapter shall keep a daily record showing the gross amount of all wagers on which he is so liable.* Oct. 20, 1951, 2:07 p. m. E. S. T., c 521, Title IV, S471 (a), 65 Stat. 529."

Sub-chapter B of Chapter 27A of Title 26, Section 3290 provides as follows:

"A special tax of $50.00 per year shall be paid by each person who is liable for tax under sub-chapter (A) or who is engaged in receiving wagers for or on behalf of any person so liable."

Section 3291 provides as follows:

"*Registration*:

(a) Each person required to pay the special tax under this sub-chapter shall register with the collector of the district—

(1) His name and place of residence;

(2) If he is liable for tax under sub-chapter (A) each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) If he is engaged in receiving wagers for or on behalf of any person liable for tax under sub-chapter (A) the name and place of residence of each such person.

(b) Where sub-section (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) In accordance with the regulations prescribed by the Secretary, the collector may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter."

The regulations authorized by the Act and here in controversy, which were promulgated by the Department as appears in 26 Code of Federal Regulations, 1949 Ed., 1952 Cumulative Pocket Supplement, Part 325, include the following:

Subdivision b of Section 325.21 provides:

"A person is engaged in the business of accepting wagers *if he makes it a practice to accept wagers with respect to which he assumes the risk of profit or loss depending upon the outcome of the event or the contest with respect to which the wager is accepted* * * *"

Section 325.25 reads as follows:

"When tax attaches: (a) The tax attaches when (1) a person engaged in the business of accepting wagers with respect to a sports event or contest, or (2) a person who operates a wagering pool or lottery for profit, *accepts a wager or contribution from a bettor.* * * * "

STATEMENT

Defendant was tried and convicted in the District Court for the Southern District of Florida upon an indictment charging violation of Title 26 Section 3285, etc., of U. S. C.

Whorley Whidden, Government witness, testified (R-15-35) that he was a State Beverage Inspector; that the defendant was driving his automobile along the highway and that he, on November, 3, 1951, stopped him by blowing a siren; that he searched the defendant's car and observed some bags lying on the seat and he could see some currency and tickets in the paper bags, and that he asked the defendant if that wasn't bolita and the defendant said "Yes, it is." (R-28).

After the witness, Whidden, testified, the Government introduced testimony thoroughly explaining the defendant's connection with said tickets and said lottery. Joseph B. Hill (R-104), who testified that he was a special agent, Internal Revenue Service, testified on *direct examination* (R-107) that on July 7, 1952, he had a conversation with the defendant, and that the defendant "stated that he had been wanting to meet me and had been wanting to talk to me for quite some time; that he didn't expect any consideration for himself, but he wanted to tell us the set-up of that bolita operation in Pinellas County."

"Q. Did he tell you the set-up, sir?

A. He did.

Q. What was that conversation? (Rec. 108)

A. He stated that at the time he was apprehended by the officers on November 3, 1951, that he was on his way to turn in his bolita pick-up to Tommy Marchese. He said that he did not know Marchese's address, but he could take us to his house. I told him that wouldn't be necessary, that we were familiar with Tommy Marchese, and he said that *he was employed by Santo Trafficante, Jr.*"

This same witness further testified on *direct examination* that he had another conversation on July 17, 1952, with the defendant (R-110-11) in which he said the defendant told him:

"He said that he was employed by Santos Trafficante, Jr., of Tampa, to pick up a bolita route from Tarpon Springs down to Clearwater and turn it over here in Tampa to Tommy Marchese, and that he had been so employed for approximately a year and had been picking up that route and bringing it here to Tampa and turning it in to Tommy Marchese, *and that he was being paid $40.00 per week.*"

The Government offered no proof showing that Santos Trafficante, Jr., by whom defendant was employed, or Marchese, the man to whom he was going to deliver said tickets and money, had not registered and paid all required tax.

The following excerpt from the Circuit Court of Appeals Opinion (App. 1a-6a) on page 2 thereof is significant on the facts of this case.

> "The Act under which this indictment was brought became effective November 1, 1951, and on November 3, of that year appellant was arrested in possession of a package of money and bolita, or Cuba tickets. Indictment charged that he '* * * being then and there engaged in carrying on the occupation of accepting wagers, as defined by Section 3285 (b) (C) and (2), Title 26 U. S. C. did wilfully, during the month of November, 1951 * * * fail to register and pay the special tax required by law to be paid by him, in violation of Section 2707, 3285, 3290, 3291, and 3294, Title 26 United States Code.' He admitted that at the time of his arrest he was employed by the proprietors of a lottery operation as a messenger or 'pick-up man' for a regular salary of $40.00 per week, *but he denied (and the Government did not prove) that he ever actually received any wagers for himself or for the proprietors.*" (Emphasis supplied

Deputy Sheriff Peacock testified as a Government witness that he had been serving as a deputy sheriff for approximately 12 years and from his experience in dealing with lottery and bolita cases he had learned that the persons engaged in those transactions put indiscriminate and fictitious dates on said tickets for the purpose of confusing and confounding the law enforcement officers and he was asked the following question:

> "In other words, merely by looking at the date—under the custom that was engaged in of putting indiscriminate dates—merely looking at the dates that appeared on the face of the ticket, you could

not swear, from that, when that ticket was sold or when that game was played. That's correct isn't it?"

"A. That's right." (R-85-86).

Joseph B. Hill, Internal Revenue Agent and Government witness testified concerning the operation of bolita and lottery as follows: (R-113) That he was familiar with the procedure of the operation of bolita and lottery and that (R-114),

"Cuba, bolita and bond are all variations of the numbers lottery"

and he testified that

"bolita is, or used to be—it's been changed now—but a couple of years ago it was operated one way and now—due to enforcement activities—it is being operated another way."

He testified that bolita used to be a daily proposition. They sold chances every day and the numbers were thrown or determined every night and the pay-off made —"That's the way it formerly operated"; he testified that now the chances are sold—he did not testify how bolita is now thrown, whether weekly, daily or monthly, but, upon being asked the question "How about Cuba?" he testified that the chances on that game are sold the same as these other activities, *but the number is determined once a week. The Cuban national lottery has a throwing and announce it over the radio at 2 o'clock of Saturday of each week, and the number thrown in the Cuban lottery and announced over the radio is the same number for Cuba.*

REASONS FOR GRANTING THE WRIT

In this cause, the Court of Appeals has rendered a decision on a question of Federal law which has not been decided by any other Court, including this Court, and which should be settled and determined by this court. Likewise, the Court of Appeals has by its decision, so far departed from the accepted and usual course of judicial proceedings and so far sanctioned such a departure by the District Court for the Southern District of Florida as to call for an exercise of this court's power of supervision.

A

The Circuit Court of Appeals' Opinion, upon its face, makes it crystal clear that that court agreed with this petitioner's interpretation and contention of what the record discloses to be the facts in this case, but the court arbitrarily extended the terms of the statute so as to include the petitioner therein. The terms of the involved statute clearly and definitely define and specify the persons and classes of persons required to pay the tax and register. It is significant that the lower court in creating a new class of persons to be required to register and pay the tax nowhere in its opinion claimed the statute was in anywise ambiguous, but arbitrarily extended the statute because it felt that Congress had acted inconsistently by not including the classes of persons which it thought should be brought under the operation of the act and, therefore, by its opinion proceeded to bring such persons and classes under the involved statute.

In this regard we quote from the Circuit Court's decision (App. 1a) on page 3a thereof, as follows:

"It is clear that appellant was not liable for the payment of the excise tax upon the wagers themselves, as imposed by Section 3285, because that tax was payable only by a person who had a proprietary interest in or were the operators of (a) the business of accepting wagers or (b) a wagering pool or lottery. It follows that appellant was liable for a special tax only if he came within the class of persons intended to be covered by the provisions 'engaged in receiving wagers' for or on behalf of one liable under Section 3285. (Emphasis supplied)

"As we pointed out in the Hodges case, the primary purpose of the statute as a whole was to produce revenue by subjecting commercialized gambling to taxation. Its provisions clearly indicate that the special tax applies to the principal or proprietor and all person who were knowingly engaged or used by him to receive wages. *While the express wording of Section 3290 does not include other employees directly involved in the operation, we think it would be inconsistent with the purpose of the statute to tax those who physically receive the wagers and exempt those whose duties were as important and as much a necessary part of the gambling operation.* We think the employee who collected the wagers and delivered them to the principal was as much a part of the business and as much involved in the acceptance of the wagers as the person who physically received them from the patrons, and, therefore, was 'engaged in receiving wagers' in the sense contemplated by the statute." (Emphasis supplied)

The court then proceeded to quote an example set out under Regulation 132 promulgated on *November 3, 1951, Section 325.41* thereof. *It is highly significant that said example, which the court tied its opinion to, was promulgated on the very day defendant was arrested, to-wit, November 3, 1951,* said example being as follows:

> "B operates a number game. He has an arrangement with ten persons, who are employed in various capacities, such as bootblacks, elevator operators, newsdealers, etc., to receive wagers from the public on his behalf. B also employs a person to collect from his agents the wagers received on his behalf. B, his ten agents, and the employee who collected the wagers received on his behalf are each liable for the special tax."

The foregoing quoted example is in direct conflict with and repugnant and contradictory to regulations promulgated by subdivision b of Section 325.21 and Section 325.25 quoted on pages 5-6 hereinabove.

In addition it is clear that the Treasury Department in promulgating the above example to their rules, as well as the lower Court in tying its opinion to said example, have both extended the terms of the statute herein in controversy and that the example, as well as the lower court's decision, is an enlargement of the express terms of the statute and encroaches upon the legislative powers of the Congress.

In the case of *Morrill, Collector, etc., vs. Jones,* 106 U. S. 466, 1 Sup. Ct. Rep., 423, it is stated:

> "The Secretary of the Treasury cannot by his regulation alter or amend a Revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. In the present case we are entirely satisfied the regulation acted upon by the collector was in excess of the power of the Secretary."

The evidence was legally insufficient to support the judgment of conviction because the Government failed to prove beyond a reasonable doubt *that the defendant was engaged in carrying on the occupation*

of accepting wagers for profit, but on the contrary, established that defendant for a fixed salary merely picked up wagers which had been previously accepted by operator's agents and transported same to the operator in Tampa. He had no proprietary interest in any lottery and nothing to do with the acceptance of said wagers from bettors, and, therefore, was not required to register and pay the special tax.

The constitutionality of this Act was upheld as a revenue measure only in *United States vs. Kahriger,* 73 Sup. Ct. 510, 345 U. S. 22, by a divided court this Court held:

> *"This court is not concerned at all with the moral aspect but purely and simply what class of persons are required to pay the tax and register."* (Emphasis supplied.)

The defendant was sentenced to one year imprisonment. This statute, providing criminal penalties, is to be strictly construed, *Farmer vs. U. S.* 128 Fed. Rep. (2) 970 (10th Circuit). That case involved the construction and application of a Section of the Revenue Act providing that a person should not engage in a designated trade or business without payment of special tax, and the court, among other things, held:

> "A criminal statute must be strictly construed."
>
> "Ambiguity as in criminal statutes should not be resolved so as to embrace offenses not clearly within the law."
>
> "The facts charged and proved must bring the defendant plainly within the criminal statute."

In the case of *United States vs. Lacher,* 134 U. S. 624, 628; 10 S. Ct. 625, 626, this Court held:

"There can be no constructive offenses; and before a man can be punished his case must be plainly and unmistakably within the statute."

The question here contended for is concluded by the case of *United States vs. Weitzel,* 246 U. S. 533, 38 S. Ct. 381, in that case this court had before it the question of whether or not Weitzel, a receiver appointed by the comptroller of currency, could be convicted of embezzlement or making false entries under a statute providing for the prohibition and punishment of such offenses when committed by a *president, director, cashier, teller, clerk or agent of a national bank.* In reversing Weitzel's conviction this court said:

"* * * Furthermore a casus omissus is not unusual, particularly in legislation introducing a new system. The fact that in 1879 Congress should have found it necessary to enact a general law for the punishment of officers of the United States who embezzle property entrusted to them, but not owned by the United States, shows both how easily a casus omissus may arise and how long a time may elapse before the defect is discovered or is remedied. *Statutes creating and defining crimes are not to be extended by intendment because the court thinks the legislature should have made them more comprehensive.* Todd v. United States, 158 U. S. 278, 282, 15 Sup. Ct. 889, 39 L. Ed. 982; United States vs. Harris, 177 U. S. 305, 20 Sup. Ct. 609, 44 L. Ed. 780."

In *Winters vs. People of the State of New York,* 333 U. S. 507, 68 Sup. Ct. Rep. 665, 670, this court held:

"The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement. The crime 'must be defined with appropriate definiteness' Pierce vs. United States, 314 U. S. 306, 311, 62 Sup. Ct. 237, 239, 86 L. Ed. 226; Cantwell vs.

State of Connecticut 310 U. S. 296, 60 Sup. Ct. 900, 84 L. Ed. 1213, 128 A. L. R. 1352. There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment. The vagueness may be from uncertainty in regard to persons within the scope of the act, Lanzetta vs. State of New Jersey, 306 U. S. 451, 59 Sup. Ct. 618, 83 L. Ed. 888, or in regard to the applicable tests to ascertain guilt."

In the case of *Lanzetta et al vs. State of New Jersey,* 306 U. S. 451, 59 Sup. Ct. Rep. 618-619, in reversing the conviction of Lanzetta and others under a New Jersey Statute, this court said:

"* * * No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. The applicable rule is stated in Connally v. General Const. Co., 269 U. S. 385, 391 Sup. Ct. 126, 127, 70 L. Ed. 322: 'that the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.'"

In the case of *Kirchman v. United States,* 256 U. S. 363, 41 Sup. Ct. Rep. 514, this court had before it the question of whether or not a porter, employed by a railroad under the control of the United States Government, was an officer of the United States within Criminal Code, Sec. 39 (Compiled General Statutes, Sec.

10203), making it an offense to bribe an officer to influence his actions. It was charged that Kirchman had bribed an officer who was supposed to have been a porter on a railroad taken over by the Government. In reversing Kirchman's conviction, this court held:

> "* * * *We are constrained to the conclusion that the construction given in the court below and insisted upon by the Government, practically recasts the statute from one embracing officials, and those discharging official functions, into one including every person discharging any sort of duty while the Government is in control of the work."* (Emphasis supplied)

In the instant cause we think the court likewise has recast the statute, Section 3290, Title 26, to make it read:

> "A special tax for $50.00 per year shall be paid by each person who is liable for tax under sub-chapter A or who is engaged in receiving wagers for or on behalf of any person so liable: Provided, however, that any person not so liable for said tax and who is not engaged in receiving wagers for or on behalf of any person so liable, shall be liable for the said $50.00 tax and required to register if the duties performed by him are important and are an essential part of the gambling operation."

The Government had cast upon it the burden of proving that defendant accepted wagers in a lottery for profit and that he did so as a business. The evidence introduced by the Government affirmatively established defendant was a mere messenger, that his only remuneration was a fixed weekly salary (and the lower court found this to be true) and, therefore, did not

fall within the class of persons required to register and pay the tax. The lower court found this to be true under the express words of the statute.

The Statute makes clear that the only classes of persons required to pay the special tax under Section 3290, and the only persons required to register under Section 3291, are:

(a) Persons who conduct or operate any wagering or lottery pool for profit, or

(b) Persons who are engaged in the business of accepting wagers in such pool or lottery.

The operator is required to register, pay a special tax of $50.00 and is also liable for the ten per cent excise tax *on all wagers placed in said pool or lottery;* a person who is engaged in the business of accepting such wagers is required to register and pay the special tax of $50.00 and is also liable for the ten per cent excise tax *on all wagers placed with him, and each of said classes are required to keep records of all wagers accepted by them.*

So, by the very terms of the act, the classes of persons responsible for the payment of the tax, and, therefore, required to register, are limited, definite and fixed and do not include the class in which defendant falls.

It is clear that Congress did not fasten upon all employees connected with such operation, liability for the tax and the requirement of registration. A messenger or pick-up man may be necessary to the conduct of the lottery—likewise, the bookkeepers, auditors, clerks and stenographers, who prepare the rec-

ords and handle the matters after the wagers have been accepted, may be considered necessary cogs in the gambling operation, yet they are not liable for the tax nor subject to the requirement of registration, because the Act delineates, limits and specifies those liable for the tax and required to register. *This is true, notwithstanding the fact that all of them might be prosecuted for violation of the State anti-gambling laws.*

In the case of *Anderson vs. United States,* 30 Fed. (2) 485, it was held:

> "While mere employee may be guilty, as accomplice, of making illegal sale of liquor, one cannot be regarded as either accomplice or principal in conducting retail liquor business under revised statute Section 3242, as amended by Act. February 8, 1875 (26 U. S. C. A. Section 193), *unless he is in fact one of the proprietors whose duty it is to pay the license tax.*"

Holding in like effect:

Walker vs. United States, 176 Fed. (2) 796 (9th Cir.)

Gerardi vs. United States, 22 Fed. (2) 189 (1st Cir.)

The record is clear that the Circuit Court of Appeals has found, on the face of its opinion, as a matter of fact, that petitioner is not within those classes of people who are required by the statute to register and pay the $50.00 tax. Yet, in violation of all of the above cited cases, as well as Article 1, Section 1, United States Constitution, the Circuit Court of Appeals proceeded to ingraft into the Statute, by judicial interpre-

tation, a new class of persons which does include this petitioner which Congress did not see fit to include in the Statute at the time of its enactment.

In *Pierce vs. United States,* 314 U. S. 306, 62 Sup. Ct. Rep. 237, 239, this court held:

> "* * * these legislative extensions of the scope of the act were in accord with the growing importance of the administrative cooperation, but a comparable judicial enlargement of a criminal act by interpretation is at war with the fundamental concept of the common law that crimes must be defined with appropriate definiteness. * * * * The statute in the Strange case points directly at a particular class of persons as the object of the sanction. It leaves, as does the statute here, no room for enlargement of its meaning."

See also the case of *United States vs. Alpers,* 338 U. S. 680, 70 Sup. Ct. Rep. 352.

See also the case of *United States vs. Peterson,* 1 Fed. (2) 1018-19, wherein the court held:

> *"It does not suffice that defendant's case may be within the mischief of the statute, for, not clearly within their letter, it is not within their intent.* 'Laws which create crime ought to be so explicit that all men subject to their penalties may know what * * * * to avoid,' and 'before a man can be punished, his case must be plainly and unmistakably within the statute,'. Says the Supreme Court in U. S. v. Brewer, 139 U. S. 278, 11 Sup. Ct. 538, 35 L. Ed. 190."

To like effect see *Robert M. Harrison, United States Consul, plaintiff, vs. George C. Vose,* 13 L. Ed. 179, 53 U. S. Sup. Ct. Rep. 371, wherein this court held:

"Of course, we must in this, as in all cases begin the inquiry with the presumption that the defendant is innocent, and that the burden of proof to make out the guilt devolves upon the plaintiff. In the construction of a penal statute, it is well settled, also, that all reasonable doubts concerning its meaning ought to operate in favor of the respondent. In the United States vs. Shackleford, 5 Mason, 445, Justice Story says: 'it would be highly inconvenient, not to say unjust, to make every doubtful phrase a dragnet for penalties.'

"It is settled too, that, where penalties are to be recovered, greater fullness of evidence is necessary to make out such a case as the law contemplates. United States vs. Wilson, 1 Baldwin CC 101; Greenleaf on Evidence Section 65. *The proof must, then, bring a transaction within the spirit as well as the letter of the law, and must usually show a plain breach of both.* In The Enterprise, 1 Paine, CC 32, it is said that one shall not incur a penalty in cases of doubt, and courts should not extend a construction beyond what is clear in such cases. See further on this, Taber's case, 1 Story, 6; 1 Story, 255 and 256; and Sloop Elizabeth, 1 Paine, CC 11."

B

As the effective date of the Act here involved was Thursday, November 1, 1951, it follows that prior to November 1, 1951, no excise tax attached to wagers and no persons were required to register or pay the special $50.00 tax. As seen from the evidence above set out, the wagers here involved were on a lottery played weekly and determined each Saturday by the throwing of the national lottery in Cuba. November 1, 1951, was on Thursday and the defendant was arrested the following Saturday, November 3rd.

The burden rested upon the Government to prove that the wagers in defendant's possession were *accepted* on or after the effective date of the Act, to wit, November 1st, 1951, for otherwise, there was no law, prior to November 1st, 1951, which could be violated even by the person who accepted the wagers. The evidence is purely and wholly circumstantial as to whether or not any of the wagers which had been accepted by other persons and picked up and being transported by defendant at time of his arrest, were in fact accepted *before or after November 1, 1951.* All of the testimony is equally subject to the construction that said wagers were accepted on Sunday, Monday, Tuesday or Wednesday, before the effective date of the Statute, as it is subject to the construction that they were accepted on Thursday, Friday or Saturday of same week after the effective date of the statute. This being true, it is apparent that the evidence does not meet the requirement and standard as to circumstantial evidence which requires the circumstances to be not only consistent with guilt, but inconsistent with innocence. The evidence in this cause is consistent as well with innocence as it is with guilt and hence wholly legally insufficient to support a judgment of conviction.

And yet, the Circuit Court of Appeals brushed the sufficiency of the evidence aside in this cause with the casual statement that it was immaterial when the wagers found in defendant's possession were "placed or accepted," whether before or after the effective date of the Act.

CONCLUSION

The Circuit Court of Appeals, by its opinion has encroached upon the exclusive right of Congress to legislate and has by judicial decree engrafted an amendment upon the statute by creating a class of persons subjecting them to its operation, which the Congress did not see fit to include in said Statute. Quite aside from the above, the evidence is wholly legally insufficient to establish the offense charged in indictment as well as fails to disclose any offense against the statute *after its effective date,* even if the defendant had been validly included in the terms of the statute by the Congress.

It is, therefore, respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX

OPINION OF THE COURT—FILED JUNE 2nd, 1955

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 15183

NICK SAGONIAS,

Appellant

VERSUS

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(June 2, 1955.)

Before HUTCHESON, Chief Judge, TUTTLE, Circuit Judge, and DAWKINS, District Judge.

DAWKINS, District Judge: Like No. 15,152, *Hodges v. United States,* decided this date, this is an appeal from a conviction for failure to register and pay the special tax imposed by former Section 3290 of the Internal Revenue Code. What we had to say in the *Hodges* case is material to but not dispositive of the issues presented here.

The Act under which this indictment was brought became effective November 1, 1951, and on November 3 of that year appellant was arrested in possession of a package of money and bolita, or Cuba lottery, tickets. The indictment charged that he:

> "* * * being then and there engaged in carrying on the occupation of accepting wagers, as defined in Section 3285 (b) (C) and (2), Title 26, United States Code, did willfully, during the month of November, 1951, * * * fail to register and pay the special tax required by law to be paid by him, in violation of Sections 2707, 3285, 3290, 3291, and 3294, Title 26, United States Code."

He admitted that at the time of his arrest he was employed by the proprietors of the lottery operation as a messenger or "pick up man" for a regular salary of $40.00 per week, but he denied (and the Government did not prove) that he ever actually received any wagers for himself or for the proprietors. He further denied that he was "engaged in the business of receiving wagers" in the sense contemplated by the statute. He appeals his conviction on the grounds: (1) that the statute did not contemplate the imposition of the tax upon one who did not actually receive wagers; (2) that the evidence failed to prove any wagers were placed or accepted after the effective date of the Act; and (3) that the evidence did not prove he had willfully failed to register and pay the tax.

In *Hodges, supra,* we held that the special tax under Section 3290 was imposed upon persons who were the owners or operators of a wagering business and upon anyone who knowingly received wagers for such persons. Here, however, we must decide whether the tax also applies to one who admittedly is employed

to perform duties necessary to and an integral part of a lottery operation, but who does not himself physically receive the wagers.

It is clear that appellant was not liable for the payment of the excise tax upon the wagers themselves, as imposed by Section 3285, because that tax was payable only by persons who had a proprietary interest in or were the operators of (a) the business of accepting wagers or (b) a wagering pool or lottery.[1] It follows that appellant was liable for a special tax only if he came within the class of persons intended to be covered by the provisions "engaged in receiving wagers for or on behalf of" one liable under Section 3285.

As we pointed out in the *Hodges* case, the primary purpose of the statute as a whole was to produce revenue by subjecting commercialized gambling to taxation. Its provisions clearly indicate that the special tax applies to the principal or proprietor and all persons who were knowingly engaged or used by him to receive wagers. While the express wording of Section 3290 does not include other employees directly involved in the operation, we think it would be inconsistent with the purpose of the statute to tax those who physically receive the wagers and exempt those whose duties were as important and as much a necessary part of the

1 "A person is considered to be in the business of accepting wagers if he is engaged *as a principal who, in accepting wagers, does so on his own account.* The principals in such transactions are commonly referred to as 'bookmakers,' although it is not intended that any technical definition of 'bookmaker,' such as the maintenance of a handbook or other device for the recording of wagers, be required. * * * It is not intended that to be 'engaged in the business of accepting such wagers' a person must be either so engaged to the exclution of all other activities or even primarily so engaged." (Emphasis supplied.) House Report No. 586, June 18, 1951, *U. S. Code and Congressional Service,* 82d Cong., 1st Sess., p. 1839; Senate Report No. 781, September 18, 1951, id., p. 2091.

gambling operation. We think the employee who collected the wagers and delivered them to the principal was as much a part of the business and as much involved in the acceptance of the wagers as the persons who physically received them from the patrons, and was therefore "engaged in receiving wagers" in the sense contemplated by the statute.

This was the interpretation made by the Treasury Department in Regulation 132, promulgated November 3, 1951. Section 325.41 of the regulation,[2] in discussing the persons liable for the special tax, gave the following example:

> "B operates a numbers game. He has an arrangement with ten persons, who are employed in various capacities, such as bootblacks, elevator operators, news dealers, etc., to receive wagers from the public on his behalf. B also employs a person to collect from his agents the wagers received on his behalf. "B, his ten agents, *and the employee who collects the wagers* received on his behalf are each liable for the special tax." (Emphasis supplied.)

In 1954, when T.R. 132 had been in effect for nearly three years, the Congress completely revised and amended the Internal Revenue Code, and the provisions of former Section 3290 were re-enacted verbatim as Section 4411 of the new Code. We think it significant that the Congress saw no necessity to change or clarify the wording of the statute in the light of its interpretation by the Treasury Department. Certainly, we cannot assume that the Congress was ignorant of that interpretation; on the contrary, we must presume that reenactment of the same wording was deliberate and

2 Title 26, Code of Federal Regulations, 1949 Edition, Cumulative pocket supplement for 1954, Section 325.41.

with full knowledge of the published regulation. We are, therefore, of the opinion that appellant was within the class of persons intended to be taxed by Section 3290.

There is clearly no merit in appellant's complaint that the evidence failed to prove any wagers were placed or accepted after the effective date of the Act. By admission in his brief, he was, when arrested, engaged in the activity which subjected him to the tax; and in view of what has been said herein, it is immaterial when the wagers he was delivering were placed or accepted.

The contention that the evidence failed to show willfulness is equally untenable. There is evidence tending to show that appellant was concerned about the necessity to register and pay the tax, and had discussions with his associates about it prior to the effective date of the Act. One of the Revenue agents testified that appellant told of a conversation with his employer wherein appellant "asked him if he didn't think he'd better get that stamp." According to this testimony, the employer told appellant, "No, don't do anything now. Wait. Let's rock along for a few days and see what we can work out." There is also evidence to the effect that when arrested by State authorities, appellant wanted to know if they were Federal officers. We think this and other testimony furnished ample evidence from which the jury could have inferred willfulness; and the record reflects no objection to the charge given on that subject.

AFFIRMED.

TUTTLE, Circuit Judge: I concur specially.

TUTTLE, Circuit Judge, concurring specially.

I agree with all that is said in the court's opinion, and wish only to add, consistently with what I said dissenting in *Hodges v. United States,* decided herewith, for reasons intimated therein, that in my opinion the form of the indictment in this case also may have been erroneous in alleging willful failure to pay the tax as the gist of the offense under 26 U.S.C.A. §3294(c), instead of engaging in the occupation of accepting wagers or receiving wagers for or on behalf of a person so engaged. Furthermore, the majority opinion does not make it explicit that there was here also a technical variance between the indictment, which alleged that Sagonias was engaged in the occupation of accepting wagers, and the proof, which as the majority holds showed not this, but that he engaged in receiving wagers on behalf of one in that occupation.

I think that neither of these amounted to prejudicial error, however, because the record here, unlike that in the *Hodges* case, does not show any actual prejudice or any way in which the defense was misled or hampered thereby. Fed. Rules of Crim. Proc., Rule 52 (a).

ORDER DENYING REHEARING
EXTRACT FROM THE MINUTES OF JUNE 28, 1955.

NO. 15183

NICK SAGONIAS

VERSUS

UNITED STATES OF AMERICA

It is ordered by the Court that the Petition for Rehearing filed in this cause be, and the same is hereby denied.

FILED
JUL 21 1955
HAROLD B. WILLEY, Clerk

No. 252

IN THE

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 15,183

U. S. COURT OF APPEALS
FILED
JUN 20 1955
John A. Feehan, Jr.
CLERK

NICK SAGONIAS,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR REHEARING

Comes now NICK SAGONIAS, petitioner in the above entitled cause, and presents this petition for a rehearing of said cause, and, as grounds therefor, respectfully urges the following:

1.

The court having held in its opinion that the petitioner was a mere employee, paid a fixed weekly salary, and with no proprietary interest in or the operator of (a) the business of accepting wagers or (b) operating a wagering pool or lottery, the court nevertheless, notwithstanding, applied said statute to the petitioner by holding "while the express wording of Sec.

3290 does not include other employees directly involved in the operation, we think it would be inconsistent with the purpose of the statute to tax those who physically receive the wagers and exempt those whose duties were as important and as much a necessary part of the gambling operation" (Page 3 of the Opinion).

The court in thus extending the provisions of this criminal statute overlooked the unbroken line of decisions of the courts which hold that a criminal statute must be strictly construed and ambiguities in criminal statutes should not be resolved so as to embrace offenses not clearly within the law; and the facts charged and proved must bring a defendant plainly within a criminal statute. *Farmer vs. United States* 128 Fed. (2) 970, (10th Circuit). That opinion involved the construction and application of a section of the Revenue Act providing that a person should not engage in a designated trade or business without payment of special tax and that court held that the statute must be construed in accordance with the above stated principles.

Also, in *United States vs. Lacher,* 134 U. S. 624, 628; 10 S. Ct. 625, 626, the court held: "There can be no constructive offenses; and before a man can be punished his case must be plainly and unmistakably within the statute."

The court's opinion finding that the express wording of Section 3290 does not include employees of the class of petitioner clearly demonstrates that the court has created a constructive offense by its decision in violation of the above noted cases and that the court in the rendition of its opinion overlooked said decisions.

2.

It is clear from a reading of the court's opinion broadening and extending this criminal statute so as to include petitioner, it did so on the theory that the court was concerned with the moral aspect involved and the Supreme Court of the United States, in sustaining the constitutionality of the involved statute by divided court in the case of *United States vs. Kahriger,* 345 U. S. 22, 73 S. Ct. 510, distinctly held: "This court is not concerned at all with the moral aspect, but purely and simply what class of persons are required to pay the tax and register." This court overlooked and failed to consider said Supreme Court decision in that the language used by the court in that case clearly shows that all that the court is interested in is purely and simply what class of persons are *REQUIRED BY THE STATUTE* to pay the tax and register.

3.

In addition to creating a constructive offense in violation of the *Farmer* and *Lacher* cases, supra, this court, by its decision, has legislated in violation of the provisions of the United States Constitution which separate the powers of Government into three distinct fields and reserves all legislation to the National Congress, and in the rendition of its opinion, the court overlooked such constitutional provision for the separation of powers.

4.

The involved Act became effective on November 1, 1951, and petitioner was arrested on Saturday, November 3, 1951, only three days after the effective date

of said Act on Wednesday. The court by holding that "it is immaterial when the wagers he was delivering were placed or accepted," clearly overlooked the provision of the Federal Constitution prohibiting ex post facto legislation and construed said Act in such a way as to give it ex post facto operation against the petitioner.

CONCLUSION

Upon the foregoing grounds, petitioner respectfully prays that this Honorable Court will grant a re-hearing in this cause and order that this cause be set down for re-argument.

Respectfully submitted,

WHITAKER BROTHERS,

By _____
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_____
MARK R. HAWES
308 Tampa St., Tampa, Florida
Attorneys for Petitioner.

CERTIFICATE OF COUNSEL IN SUPPORT OF PETITION FOR RE-HEARING

I, the undersigned counsel for petitioner in the above cause, do hereby certify that the foregoing petition for re-hearing is filed in good faith and in my opinion, is well founded and grounded in point of law.

Of Counsel for Petitioner.

CERTIFICATE OF SERVICE

I, the undersigned counsel for petitioner, hereby certify that copies of the foregoing petition for re-hearing were served upon the respondent, United States of America, by mailing three copies thereof, postage prepaid, to Honorable Vernon Evans, Jr., Assistant United States Attorney, Post Office Building, Tampa, Florida, on this the 17 day of June, 1955.

Of Counsel for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 252

NICK SAGONIAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and concurring opinions in the Court of Appeals (Pet. App. 1a-6a) have not yet been reported. The District Court filed no opinion.

JURISDICTION

The judgment of the Court of Appeals was entered June 2, 1955. A petition for rehearing was denied June 28, 1955 (Pet. App. 7a). The petition for a writ of certiorari was filed July 21, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether a "pick up" man, who collects wagers from persons who receive them initially and transports them to the operator, is required to register and pay the occupational tax imposed by 26 U. S. C. 3290 on each person "who is engaged in receiving wagers for or on behalf of any person" engaged in the business of accepting wagers.

2. Whether it was necessary to prove that the wagers were placed after the effective date of the statute, where the "pick-up" man had them in his possession and was transporting them after such effective date.

STATUTES INVOLVED

The Internal Revenue Code of 1939 was amended October 20, 1951, 65 Stat. 529, by inserting a new Chapter, numbered 27A, providing for wagering taxes. The provisions of this new chapter took effect November 1, 1951. 65 Stat. 531.

Subchapter A of Chapter 27A includes Section 3285(d), which provides:

> Persons Liable for Tax.—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. [26 U. S. C. (1952 ed.) 3285(d)].

Subchapter B of Chapter 27A includes Sections 3290 and 3291. Section 3290 provides:

> A special tax of $50 per year shall be paid by each person who is liable for tax under subchapter A or who is engaged in receiving wagers for or on behalf of any person so liable. [26 U. S. C. (1952 ed.) 3290].

Section 3291(a) provides in pertinent part:

> (a) Each person required to pay a special tax under this subchapter shall register with the collector of the district—
>
> (1) his name and place of residence;
>
> * * * * *
>
> (3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person. [26 U. S. C. (1952 ed.) 3291(a)].

STATEMENT

In August, 1952, an indictment was returned against petitioner in the United States District Court for the Southern District of Florida charging that petitioner, being engaged in carrying on the occupation of accepting wagers, failed to register and pay the special tax required by law (R. 1-2).

The evidence showed that on November 3, 1951, petitioner was arrested by state police and searched

while driving an automobile. Bags containing bills and tickets for a lottery known as bolita were found in his car. (R. 24-28, 33; see R. 114.) Petitioner told an officer of the Internal Revenue Service that, at the time of his arrest, he was on his way to turn in his bolita pick-up to one Tommy Marchese (R. 108), and that he had been employed for approximately a year by one Santos Trafficante, Jr. as a pick-up man at a salary of $40 per week (R. 108, 110-111). Petitioner had not registered or paid the special tax imposed by the federal statute (R. 101, 129).

Petitioner was found guilty and sentenced to imprisonment for one year (R. 154, 160-161). The Court of Appeals affirmed the conviction, holding that "the employee who collected the wagers and delivered them to the principal was as much a part of the business and as much involved in the acceptance of the wagers as the persons who physically received them from the patrons, and was therefore 'engaged in receiving wagers' in the sense contemplated by the statute." (Pet. App. 4a).

ARGUMENT

Contrary to petitioner's contentions (Pet. 10-21), the decision below is correct; it is in full accord with applicable decisions of this Court; and there has been no departure from the accepted or usual course of judicial proceedings. There is no conflict among the circuits, and there is no occasion for further review.

1. Petitioner contends (Pet. 10-20) that the court below unduly extends the statute in holding

that a "pick-up" man in a lottery was a person required to register and pay the special tax imposed by 26 U. S. C. 3290, *supra,* p. 3, on one "who is engaged in receiving wagers for or on behalf of any person" engaged in the business of accepting wagers. He argues that a "pick-up" man is not within the scope of the statute because he does not take the wagers from the bettors. This argument is directly rebutted by the wording of the statute which applies to one who "is engaged in receiving wagers for or on behalf of any person" in the wagering business; it does not refer to taking wagers from the bettors. Here petitioner, on behalf of his employer in the wagering business, went around and received the tickets and the money. He thus received wagers on behalf of his employer within the literal terms of the statute.

As the court below noted (Pet. App. 4a), the statute, from its inception, has been administratively so construed by the Treasury Department. The Treasury Regulation, issued under Chapter 27A of the Internal Revenue Code immediately after that chapter was first enacted, 26 CFR (1955 Supp.) 325.41, illustrates the requirements as to the need for registration, as follows:

> B operates a numbers game. He has an arrangement with ten persons, who are employed in various capacities, such as bootblacks, elevator operators, news dealers, etc., to receive wagers from the public on his behalf. B also employs a person to collect from his agents the wagers received on his behalf.

> B, his ten agents, *and the employee who collects the wagers* received on his behalf are each liable for the special tax.[1] [Emphasis supplied.]

As the court below also pointed out (Pet. App. 4a, after these regulations were promulgated, the statute was reenacted without change in the 1954 revision of the Internal Revenue Code (Sec. 4411), thus indicating Congressional approval of the interpretation. *Helvering* v. *Winmill,* 305 U. S. 79, 83; *Commissioner* v. *Flowers,* 326 U. S. 465, 469; *Helvering* v. *Griffiths,* 318 U. S. 371, 395.

2. Petitioner also argues (Pet. 20-21) that the evidence is insufficient to support his conviction in that there was only circumstantial proof that the wagers were placed after the effective date of the statute, Thursday, November 1, 1951. Petitioner was arrested on Saturday, November 3, admittedly when he was in the process of delivering the tickets and slips. If the pick-up and delivery were correctly held to be within the scope of the statute, as discussed above, then petitioner was properly convicted, since he concededly was engaging in that activity when he was arrested after the effective date of the statute. The time the wagers were

---

[1] Another illustration in the same regulations is to the effect that a general bookkeeper or secretary in the office of the person in the wagering business would not be required to register. Such employees obviously do not receive the wagers on behalf of the employer in the same direct way that a pick-up man does.

actually placed was, as the court below held, wholly immaterial (Pet. App. 5a).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.

WARREN OLNEY III,
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BEATRICE ROSENBERG,
Attorney.

AUGUST, 1955.

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